

evaluating viewing data, and the Commission should permit stations to refer to their significantly viewed status for that limited purpose.

VI. REVISIONS TO SECTION 76.51 OF THE COMMISSION'S RULES

While NAB takes no position on the specifics of how individual market listings in section 76.51 should be updated, we provide the following general recommendations and observations.

First, it would appear that updating the list through wholesale adoption of Arbitron market designations, and more particularly the manner in which Arbitron chooses to hyphenate communities in a market, would not be prudent. When the Commission adopted its original 76.51 list of stations, it recognized the need to make various adjustments to the 1970 prime-time household rankings used as the basis to create the list.^{18/} In evaluating subsequent requests to revise market hyphenations on the list, the Commission has considered such factors as the distance between the communities to be hyphenated, coverage patterns, competitive and public interest considerations.^{19/} Because Arbitron does not use the same criteria in creating its hyphenations, wholesale adoption of an Arbitron's ADI list would be inappropriate.

Second, as discussed *supra* at 3-4, for reasons of certainty and stability, NAB urges that the 76.51 list be updated in three year cycles to coincide with the retransmission consent/must carry election process. In this regard, there appears to be merit

^{18/} Notice at n. 26.

^{19/} See, e.g., Notice of Proposed Rule Making, MM Docket No. 92-295, 57 Fed. Reg. 59331 (Dec. 15, 1992) at ¶ 6; *Cable Report and Order*, *supra* n. 16, 36 FCC 2d at 176.

to the Commission's proposal to expand the 76.51 list beyond the top 100 markets. Under the current rule, market hyphenations in 100 plus markets are determined by the listing contained in the ARB Television Market analysis for the most recent year at the time that an individual program exclusivity contract is executed.^{20/} To the extent that this mechanism relies on Section 73.658(m) of the Commission's Rules, it is significant that the Copyright Office apparently refuses to recognize Commission actions with respect to that rule in connection with the mechanics of the cable compulsory license.^{21/} Incorporating all markets into the section 76.51 list would provide greater clarity, certainty and stability to both stations and cable systems in 100 plus markets.

Third, in note 27 of the *Notice*, the Commission re-opens its *Further Notice of Proposed Rule Making* in Gen. Docket 87-24 "to facilitate coordination of the overlapping aspects" of that proceeding and the instant proceeding. In its *Further Notice* in Gen. Docket 87-24, the Commission has under consideration updating section 76.51, as well as possible revision of all of the geographic limitations in its program exclusivity rules. It is unclear whether Gen. Docket 87-24 is being reopened only insofar as it relates to updating section 76.51, or whether the Commission now intends to revisit modification of all of its program exclusivity rules as well.^{22/}

^{20/} See § 76.92 Note; § 76.151 Note, and § 73.658(m).

^{21/} Notice of Proposed Rule Making in MM Docket No. 92-295, *supra* n. 19, 57 Fed. Reg. 59331 at n. 1.

^{22/} The first sentence of Footnote 27 to the *Notice* suggests only the update of the section 76.51 list is being revisited in Gen. Docket 87-24. However, paragraph 23 of the *Notice* suggests further consideration of some or all of the program exclusivity rules as well.

NAB counsels strongly *against* considering revisions to the geographic limitations of the program exclusivity rules in either proceeding at this time. Resolution of the complex issues that truly are essential to the implementation of must carry, retransmission consent, and other provisions of the Act within the time constraints provided is an all-consuming task. Resolution of the complex issues relating to the program exclusivity rules, some of which have implications for cable, and some which do not, clearly is not essential to implementing must carry or retransmission consent. Concerns expressed in paragraph 23 of the *Notice* about potential anomalies that might arise in accommodating must carry, network nonduplication, and syndicated exclusivity requests are speculative, and either may be resolved by private parties, or may require consideration of market specific circumstances if they need be resolved by the Commission.

NAB believes the far wiser course is to wait and see if, in fact, such problems arise; if they do, to deal with them initially on an ad hoc basis through waivers, and, with a body of practical experience, consider adoption or modification of rules at a later time, if necessary.

VII. DEFINITION OF NETWORK/SUBSTANTIAL DUPLICATION

The Commission notes that the Act allows cable systems to decline carriage of stations which substantially duplicate the signal of another commercial station eligible

for must carry status on that cable system. The *Notice* (§ 30) seeks comment on the definition of "substantially duplicates" for this purpose.^{23/} In particular, the Commission asks whether stations' total program schedules should be examined in determining whether two stations duplicate each other, or only a select portion such as prime time. The House Committee Report is instructive on Congress' intentions in enacting the exception to must carry for substantially duplicating stations:

"The term 'substantially duplicates' is intended to refer to the simultaneous transmission of identical programming on two stations . . . which constitutes a majority of the programming on each station. The Committee does not intend, however, that if two stations air programs of the same category (such as cartoons, movies, or comedies), that each station's programming should be considered as duplicating that of the other."^{24/}

The drafters of the Cable Act therefore intended that only stations which carry the same programming at the same time over a majority of their entire program schedules be considered to duplicate each other sufficiently to permit a cable system to choose to carry only one of them. Since the intent of the must carry provisions is to ensure that cable audiences have access to the programming of local stations,^{25/}

~~the Commission should narrowly construe the "substantially duplicates" exception that NAB takes no position on whether the Commission should use the same standard to define network stations and situations where stations are deemed to permit cable operators to choose not to carry some local signals substantially duplicate each other, or for what definition of a network the Commission should adopt for purposes of the must carry rules.~~

^{24/} H.R. REP. No. 628, 102d Cong., 2d Sess. 94 (1992).

^{25/} *Id.* at 54.

VII. CARRIAGE OF PROGRAM-RELATED MATERIAL

Paragraph 32 of the *Notice* asks for comments on how the Commission should implement section 614(b)(3)(A) of the Act which requires cable systems to carry, for all commercial must carry signals, program-related material included in the VBI or on subcarriers, unless such carriage is not "technically feasible."^{26/} As an initial matter, section 615(g)(1) of the Act requires that closed caption transmissions on line 21 of the VBI be retransmitted for all noncommercial must carry stations. If a cable system is able to comply with that carriage requirement, the Commission should view with considerable skepticism any claims that it is not technically capable of retransmitting VBI material for commercial must carry signals.

The Commission has recognized the benefits to consumers of signal enhancements, such as ghost canceling, carried over the VBI of a television signal.^{27/} To guarantee that consumers receive the full benefit of these enhancements, the Commission should establish rules that ensure that cable systems treat these signal enhancements in such a way as to maximize their effectiveness to subscribers.

^{26/} In note 42, the Commission suggests that it should treat the statutory term "program-related material" as equivalent to the copyright definition of "related images." Nothing in the legislative history of the Cable Act suggests that Congress contemplated use of a copyright concept to determine what portions of a must carry signal must be retransmitted. While examining copyright treatment of related concepts may be useful to the Commission, whether any particular matter might be deemed a "related image" for copyright purposes should not control the Commission's determination of whether it is related to the primary audio and video portions of a must carry signal.

^{27/} See Report No. DC-2298, Changes in Television Technical Standards Proposed, MM Docket 92-305, Dec. 28, 1992.

A cable system should be required to carry the ghost canceling reference (GCR) signal of a local commercial television station on its designated VBI line (line 19) and deliver it to the subscriber terminal without significant impairment by the system, unless the system processes the GCR signal and removes ghosts at the cable headend. When a cable system generates no significant ghosts in its distribution system, it may be most effective for the cable operator to process the GCR signal and remove ghosts at the headend. The cable operator may wish to re-insert a new GCR signal at the headend, having processed the over-the-air signal, for use at the subscriber terminal to reduce ghosting originating within the cable system. Flexibility for the purpose of maximizing the potential benefits of ghost canceling technology should be encouraged. However, at a minimum, if it chooses not to remove ghosts at the headend, a cable operator should be required to carry the GCR signal in each must carry signal on its assigned line so that viewers with GCR circuits in their televisions can be assured of receiving the full benefit of this technology.

The Commission should also protect subscribers who purchase television sets equipped with ghost canceling circuits from problems associated with a cable operator using line 19 for signals other than GCR. If an operator deletes the GCR signal from line 19, and replaces it with some different signal, the effect may be to compromise ghost canceling circuits in subscriber television sets. This may result in a viewer who has purchased a television set with ghost canceling enhancement receiving a poorer picture than with a conventional television set. The Commission should prevent this

by establishing a rule which reserves line 19 of broadcast signals carried by cable systems for the GCR signal.

Further, as cable systems are reconfigured, the Commission should expect system operators to include in their plans the obligation to carry material on subcarriers or in the VBI. While Congress did not expect cable operators to be required to reconstruct their systems if they are presently unable to retransmit certain program-related material, it would be inconsistent with Congress' goals to permit cable operators to defeat the expectation that program-related material would be provided to subscribers by designing new or improved systems that make such retransmission impossible. This is particularly important as the scope of program-related material made available to consumers by broadcasters increases. Recent years have seen increased interest in interactive television and other program-related services. Many of these services use VBI or aural subcarrier capacity to deliver information to the viewer. Examples include TV program guides, interactive game data, and interactive television shopping.

Cable operators have recognized the potential benefits of these services. For example, Booth American announced in August 1992 that it would be providing an interactive service over its cable system in Birmingham, Michigan.^{28/} Likewise, the Commission has recognized the potential benefits of these services.^{29/} The Commis-

^{28/} See Booth American Cable Installing Prototype Interactive TV System, *Communications Daily*, Aug. 17, 1992 at 3.

^{29/} *Report and Order in Gen. Docket No. 91-2*, 7 FCC Rcd. 1630 (1992).

sion has established the Interactive Video Data Service (IVDS) at 218-219 MHz to create a return link from the TV viewer so that interactive television can grow.

The viability of these new services would be jeopardized if cable systems were allowed to create a bottleneck in the data pipeline to the viewer. A requirement to carry intact program-related material in the VBI or on subcarriers in a broadcast signal imposes a very minimal burden on cable systems. No extravagant or expensive equipment is necessary to carry these signals which are already provided in the NTSC waveform. Only a very few cable systems, therefore, should be expected to claim that they are technically incapable of carrying such material, and the Commission should require such systems to make a persuasive showing that it would not be possible to reconfigure their systems easily to accommodate

NAB notes that video signal compression systems are in development for cable systems that would dramatically alter the very form of the television signal as it travels on the cable.^{30/} Compressed video signals would be carried as digital data streams on the cable, and would be converted to NTSC form at the viewer's subscriber terminal. Since the compressed digital signals would not conform to NTSC standards, they would not contain vertical blanking intervals.

NAB urges the Commission now, before compression systems are developed and installed in cable systems, to establish the policies necessary to ensure that provision is made in these systems for sufficient set-aside data capacity to carry

^{30/} See Weinschenk, Compression Kickstart, *Cable World*, Dec. 7, 1992 at 1.

program-related VBI or subcarrier material.^{31/} Carriage of VBI material in the compressed digital data stream will impose a very minimal burden on a cable system choosing to incur the expense of installing video compression. The data rate necessary to support current VBI uses is less than 200 kbps -- a small fraction of the data rate required for the compressed video signal. Inserting the data back onto the proper VBI line at the subscriber terminal imposes no real burden either. Since cable systems are required to carry the line 21 closed captioning material, compression systems will already be required to carry the closed caption information in the data stream and to reinsert the closed caption data onto the proper VBI line at the subscriber terminal. Similar provisions can easily be made for other program-related material, if the Commission refuses to permit cable systems to claim that rebuilt systems are technically unable to carry such material. To avoid future contention, the Commission should act now, before these systems are designed, and send a clear signal that cable operators must take the obligation to carry all program-related material into account in developing new transmission systems.

IX. CHANNEL POSITIONING

Noting the mutually exclusive channel positioning options provided for in the Act, the Commission seeks comment on the manner in which such conflicts should be resolved, and whether limitations should be imposed on a station's selecting the on-

^{31/} The Commission has previously recognized the importance of including non-NTSC signals intended for display by NTSC receivers within its technical rules for cable systems. *Memorandum Opinion and Order in MM Docket Nos. 91-169 and 85-38*, 57 Fed. Reg. 61009 n. 2 (1992).

channel option. At the outset, the channel positioning scheme proposed in the *Notice* whereby *cable operators* would be permitted unilaterally to select a station's channel position from among the statutory options, ostensibly to minimize disruption to consumers, should be rejected as being directly contrary to the Act. Section 614(b)(6) of the Act clearly states that the choice of channels is to be made "at the election of the station," not the cable operator. Included among the Act's findings is the determination that cable operators have the incentive to, and have, in fact, repositioned stations to maximize viewership to cable programming and cable advertising revenues and/or to disrupt viewership and advertising to broadcast stations with which they compete.^{32/} The Commission has made similar findings.^{33/} There is little to support the proposition that, when left to their own devices, cable operators have repositioned stations to minimize disruption to subscribers. To the contrary, there is record evidence that such repositionings often have been implemented during "sweeps" periods, and/or without notice, to maximize disruption to subscribers.^{34/} Given this track record, now to allow cable operators some measure of unilateral discretion in choosing from among channel positioning options expressly provided to *stations* would undermine Congress' careful erection of a structure designed to remove control over broadcast stations' channel positions from cable operators.

^{32/} Sections 2(a)(15), (16), (19) of the Act; *see* H.R. REP. No. 628, 102d Cong., 2d Sess. 54-57, 66 (1992).

^{33/} *See Report in MM Docket No. 89-600*, 5 FCC Rcd. 4962, 5044-5046 (1990).

^{34/} *Id.*

A second channel positioning proposal included in the *Notice* for which there is absolutely no support in the Act is the suggestion that stations be entitled to their over-the-air channel position only when that position is encompassed by the basic service tier on a cable system. Establishing such an exemption from the over-the-air channel option would create a massive loophole allowing cable systems to defeat all stations' election of their over-the-air channel option, or to discriminate among stations by manipulating the channel numbers that the system chose to include in its basic tier. For example, the Montgomery County, Maryland cable system offers a basic antenna service on which channels 4, 5, 7, and 9 in Washington, D.C. are carried on channels 24, 25, 27 and 29, respectively. Surely the Commission cannot seriously contemplate a proposal that would allow a cable system to construct its basic tier between channels 20 and 35 as a means of defeating the over-the-air channel option of every VHF station in the market. Nothing in the basic tier, channel positioning, or any other provision of the Act supports the creation of this extraordinary limitation.^{35/}

NAB takes no position on whether or how a system of priorities should be established to resolve mutually exclusive claims to a given channel position. Obviously, any such system should take into account minimizing subscriber disruption, but also needs to consider post-*Quincy* cable system channel positioning practices that

^{35/} The Act permits cable systems and must carry stations to agree to carriage on a channel other than those from which the station may choose. If a television station's on-air position would cause disruption for the cable system, the operator has the ability to negotiate with the station for another position that would provide mutual benefits.

may have harmed or discriminated against one or more stations in a market. Whatever system the Commission chooses to adopt should include a mechanism whereby stations are encouraged to negotiate over mutually desirable channel positions. Thus, for example, an over-the-air channel 4 should be free to negotiate for that channel with another local station opting for must carry that has rights to channel 4 because it occupied that channel either on July 19, 1985 or January 1, 1992.

X. COMPENSATION FOR CARRIAGE

The Commission seeks comment on implementing the exceptions to the general prohibition against cable operators receiving compensation for local stations for carriage or channel positioning which permit compensation associated with: a) delivering a good quality to the cable system's headend, and b) reimbursing the cable operator for distant signal copyright fees.

A. Procedures Associated With the Good Quality Signal Requirement

The first element in implementing the good quality signal requirement must be a requirement that cable operators employ good engineering practices and take all reasonable steps necessary to extract the highest quality signal available over-the-air from stations within whose ADI it operates. Because all information necessary to make the initial determination regarding whether a station currently delivers a good quality signal to the principal headend of a cable system resides with the cable operator, NAB recommends that within 30 days after the effective date of the new rules, cable operators be required to notify any otherwise must carry eligible station of the cable system's claim that the station fails to comply with the good quality

signal requirement. Such notification should include an engineering affidavit describing the steps the operator undertook to acquire the station's signal, the signal level which it measured at the system headend, and the procedure it used in measuring the signal, consistent with sound engineering practices, that resulted in the claim that the station is failing to provide the requisite good quality signal. Absent receipt of such notice, a station may assume that it is providing an adequate signal to the cable system.

Within 30 days of receipt of a good quality signal deficiency notice, a station should be required to respond to the cable system, indicating that: a) the station concurs with the deficiency and does not intend to pursue its must carry rights by supplying a good quality signal; or b) the station concurs with the deficiency and intends to take measures necessary to provide a good quality signal together with its proposals for doing so; or c) the station disagrees with, or requests further information and consultation regarding the deficiency determination.

If a station does not maintain that it is supplying a good quality signal, the parties should be required to attempt within 30 days to resolve among themselves any outstanding signal quality issues. As part of this process, the broadcaster should be allowed to inspect the system used by the operator to receive the broadcaster's signal, and the operator should be required to expend reasonable efforts to cooperate with the broadcaster in its efforts to deliver the specified signal level to the headend. If no resolution is achieved, the remedial provisions of Section 614(d) of the Act would apply.

B. Procedures Associated With the Distant Signal Copyright Indemnification Requirement

The Commission requests comment on the implementation of the provision of the Act that conditions must carry status for stations that would otherwise be "distant" signals under the Copyright Act on their agreement to indemnify the cable system for its increased copyright liability, if any. NAB suggests the adoption of regulations for a payment system that will both accurately reflect the cable royalty structure and leave any disputes arising under stations' indemnification agreements for resolution by the courts.

The liability of cable operators for the carriage of distant broadcast signals under the cable compulsory license is determined by Section 111 of the Copyright Act and the implementing regulations of the Copyright Office and the Copyright Royalty Tribunal. Cable systems pay their royalties to the Copyright Office twice a year, within thirty days after the end of each six-month "accounting period" (January-June and July-September). They compute their royalty payments using "Statement of Account" ("SOA") forms. If a cable operator discovers or is advised of an error in its royalty calculations, it may be required later to make a supplemental payment or request a refund.

The method of calculating the amount of royalties due depends on the size of the cable system, which is measured in terms of the system's aggregate semi-annual gross receipts from subscription fees for all its tiers of service that include broadcast signals. The smallest systems ("Form 1" systems) pay a flat 28 dollars every six months, regardless of how many signals they carry. Cable systems in the next

higher gross receipts bracket ("Form 2" systems) pay a percentage of their gross receipts every six months that varies as their gross receipts increase, but is not at all affected by the number of distant signals they carry. It is only the largest cable systems, "Form 3" systems, with gross receipts in excess of 292,000 dollars per semi-annual accounting period, whose copyright royalty payments vary depending on how many distant broadcast signals they carry. The royalties due for carriage of the last-added distant signal can vary from a few hundred dollars to hundreds of thousands of dollars, depending on myriad factors, including what kind of signal is being added (i.e., independent or network-affiliated), how many and what kind of signals are already carried, what subscription fees the system charges, how many subscribers it has each month, and whether the added signal would have been permitted to be carried under the FCC's cable rules in effect before 1980.

Whether a cable system files as a Form 1, 2, or 3 system is determined after the fact, based on its semi-annual gross receipts for the particular accounting period at issue. For a variety of reasons, cable systems can move from being a Form 2 system to being a Form 3 system in successive accounting periods, or vice versa. Of the approximately 12,000 cable systems filing Statements of Account every six months, only roughly 2,000 are Form 3 systems. These systems, however, account for some 98 percent of the cable royalties collected each year.

For the roughly 10,000 cable systems that file as Form 1 or Form 2 systems, there will be absolutely no increased copyright liability associated with carrying an additional distant signal. Accordingly, stations will never need to compensate Form 1

or 2 systems within their local market to remain eligible for must carry on those systems. For a Form 3 system, the additional royalties associated with carriage of a particular additional distant signal will be a percentage of revenues which, depending on the circumstances, can be anywhere between 0.06625 % and 3.75 % of its gross receipts. Because the royalties are based on actual gross receipts, which vary based on subscriber turnover and other factors, the actual amount of additional royalties paid for carriage of the last-added distant signal (or, indeed, even whether the particular system will be a Form 3 system for the period) cannot be determined until after the end of the six-month period during which the station has already been carried.

Accordingly, NAB proposes that the Commission adopt regulations requiring that any Form 3 cable operator with which a station has agreed pursuant to section 614(h)(1)(B) of the Act to indemnify it for its increased copyright liability may collect such indemnification only upon sending the station a certified copy of its complete Statement of Account and the check or other instrument by which it has paid its semi-annual royalties, along with a letter or invoice requesting payment of only that portion of its actual royalty payment that represents carriage of the last-added station (i.e., at the lowest applicable marginal rate) for the same type of station. In addition, the Commission should require all such cable operators to serve indemnifying stations with any refund requests they file with the Copyright Office for any accounting period covered by their indemnification agreement, simultaneously with their being filed. Any disputes regarding payment of the indemnification amount should be left to the courts to determine as a matter of contract law.

Finally, in order that stations may be aware of the potential order of magnitude of their indemnification obligations, which is a complex question that can only be answered in light of facts uniquely within the knowledge of the cable operator, prior to entering an indemnification agreement, the Commission should require cable operators to provide copies of Statements of Account they have filed for the preceding three accounting periods to stations subject to Section 614(h)(1)(B) of the Act, upon request by the station.

XI. REMEDIES

The Commission seeks comment (*Notice* ¶¶ 39-40) on several aspects of the must carry remedial provision of the Cable Act, section 614(d).^{36/} NAB sees no reason why the Commission should include a time limit on the filing of carriage complaints by television stations. It is fair to assume that stations will not idly sit by and wait to assert their rights if carriage is being denied by a cable system. Further, unlike other enforcement situations where delay in bringing a complaint may complicate the Commission's task because memories of events dim, complaints about carriage involve current conditions and will not turn on events in the past or the reasons for them. If a station should wait to file a complaint, therefore, no apprecia-

^{36/} In note 49, the Commission asks what impact the comprehensive must carry provisions of the Cable Act should have on the so-called "negative must carry" remedy the Commission established when it revised the network-cable cross-ownership rule. NAB previously argued that this aspect of the network-cable rules is moot in light of Congress' determination that all full power television stations should have certain carriage rights without any particularized showing of discrimination by a cable system. *See* Comments of the National Association of Broadcasters on Petitions for Reconsideration, MM Dkt. No. 82-434 (filed Oct. 15, 1992) at 3.

ble harm to any interests other than the station's will occur. Further, since the complaint procedure applies to improper conditions of carriage, as well as a cable system's failure to carry a signal at all, it is possible that a station may not be immediately aware that its signal has been moved on a cable system, that program-related material in its signal is not being retransmitted, or that other required conditions are not being provided. A time limit might prevent such a station from obtaining relief, and would certainly lead to the Commission's becoming involved in disputes over whether a particular complaint was timely filed.^{37/}

In paragraph 40 of the *Notice*, the Commission suggests use of the special relief provisions of § 76.7 of the rules to govern carriage complaints, and asks whether it should use standard notice and comment procedures or the time limits specified in the special relief rule in place of the time periods for pleadings specified in the Act. While the Commission is free to adopt the procedures it deems necessary to enforce the Cable Act's must carry provisions, those procedures must hew to those specified in the Act. Where Congress designated a particular time period for responsive pleadings, that is the time period which the Commission must use in its implementing rules. The Commission should not, therefore, create pleading cycles for must carry complaints different from those contained in the Cable Act.^{38/}

^{37/} NAB agrees with the Commission's suggestion (*Notice* ¶ 39) that a commercial station can file a carriage complaint as soon as it receives a response from the cable system, even if that is less than 30 days after the station gives the system the required notification.

^{38/} If the Commission intended to suggest that public notice should be given and comments received on every complaint about lack of carriage or improper carriage, NAB does not understand why the Commission would propose adopting such elaborate and potentially time-consuming procedures for what was certainly intended to be a simple and quick enforcement action. With few exceptions, the only parties directly affected by a must carry complaint will be the station and the cable system. If a particular complaint appears to affect

Section 76.7 proceedings also, as the Commission notes, require the payment of a fee by the petitioner. The Commission recognizes that its other mass media enforcement actions are exempt from the fee requirement. Stations which are deprived of their statutory carriage rights should not be burdened with a substantial fee as a condition of seeking relief. The Commission should either not attempt to integrate carriage enforcement actions into § 76.7, or waive the fees for petitioners.

XII. DEFINITION OF MULTICHANNEL VIDEO PROGRAMMING DISTRIBUTOR

The Commission's role in implementing the retransmission consent provisions of the Cable Act is for the most part a limited one. The Act establishes a system of marketplace negotiations for the right of multichannel video programming distributors to use the signals of commercial broadcast stations. Congress did not intend for the Commission to regulate this process, but only to institute such regulations as are necessary for the operation of stations' election between the rights provided them under the must carry provisions and their right of retransmission consent.

Unfortunately, the *Notice* strays from this narrow role and suggests FCC involvement in a range of issues which the Congress did not intend to come within the

Commission's purview. In particular, copyright issues should not have any role in the FCC's administration of retransmission consent. The Congress made clear in the Act that it views copyright and retransmission consent as separate rights and interests. New section 325(b)(6) of the Communications Act expressly states that the retransmission consent provisions "shall not be construed as modifying the compulsory copyright license . . . or as affecting existing or future video programming licensing agreements." Provisions in any such agreements should not, therefore, have any impact on the FCC's decisions with respect to retransmission consent; nor should any asserted impact on copyright interests affect the Commission's interpretation of the Communications Act provisions regarding retransmission consent.

The first issue raised by the Commission (*Notice ¶ 42*) is which entities should be subject to retransmission consent obligations. In note 54, the Commission asks whether this definition should be tied to whether an entity retransmitting a broadcast signal is entitled to the benefits of the cable compulsory copyright license. Nothing in the Cable Act suggests such a limitation. The Senate Committee Report explains that the amendment to section 325 is intended to "close a gap in the retransmission

^{39/} consent provisions which ^{40/} was not intended by the drafters of the 1934 Act. "^{39/}

The Committee referred to the Commission's 1959 decision that cable systems were not subject to retransmission consent and concluded that the exception found by the Commission to the requirement of retransmission consent "has created a distortion in

the video marketplace."^{40/} There was, of course, no cable compulsory copyright license in 1959, and the Commission's decision that section 325 as originally written did not apply to cable systems was not dependent in any sense on the then-unknown copyright treatment which would be afforded retransmitted broadcast programs.

The principle which Congress established in the 1992 Act is consistent with the original goal of section 325 -- anyone who takes a broadcaster's signal and retransmits it should first have the consent of the station. Thus, any provider of multiple channels of video programming which supplies retransmitted broadcast signals to the public must obtain retransmission consent. On the other hand, the simple operation of a collective antenna in an apartment building to receive local television signals does not involve the redistribution of broadcast signals, and the consent of those local stations would not be required. A SMATV operator which imports distant signals should, on the other hand, be required to obtain those stations' consent.

NAB agrees that the requirement of obtaining retransmission consent should fall upon the entity providing the broadcast signal to the consumer. Thus, as the Commission suggests, providers of capacity or transmission services to other entities which in turn distribute broadcast signals to consumers should not be subject to obtaining retransmission consent.

^{40/} *Id.* at 35; see *CATV and TV Repeater Services*, 26 FCC 403, 429-30 (1959).

XIII. RETRANSMISSION CONSENT APPLIES TO RADIO

The Commission (*Notice* ¶ 43) points out that the Act specifies that the consent of any "broadcasting station" is required before its signal may be retransmitted by a multichannel video programming provider, but the Commission is required to undertake a rulemaking proceeding to govern retransmission consent only for *television* stations. The Commission asks whether Congress intended for the revised retransmission consent requirements to apply to use of radio signals by cable systems and other multichannel distributors.

The language of the Act clearly applies to retransmission of any broadcast station's signal, including the signal of radio stations. That is not only the unambiguous language of the 1992 Act; it is also consistent with Congress' purpose in eliminating an exception to the general retransmission consent provision already in section 325 of the Communications Act. That section, which was previously included in the Radio Act of 1927, applies to the retransmission of radio and television signals equally.

The reason why Congress required the Commission to conduct this rulemaking proceeding only with reference to television signals was the need to ensure that stations' new retransmission consent rights would function harmoniously with the new signal carriage provisions in section 614. No equivalent provisions exist for radio stations. They need not make an election between signal carriage and retransmission consent rights. The various limitations which Congress placed on the right of certain

commercial television stations to require retransmission consent which the Commission is directed to administer (*see infra* this page) also do not apply to radio stations.

Congress saw no need to burden the Commission with an additional rule-making proceeding when it did not anticipate that there would be any need for extensive new rules. When the retransmission consent provisions of the Act become effective in October 1993, multichannel video providers which carry radio stations' signals will be required to obtain the stations' consent.

XIV. IMPLEMENTING EXCEPTIONS TO RETRANSMISSION CONSENT

Paragraphs 46-47 of the *Notice* describe the exceptions contained in new section 325(b)(2) to the requirement that multichannel video programming distributors obtain consent from the broadcasting stations whose signals they retransmit. New section 325(b)(3)(A) requires the Commission to adopt in this proceeding "such other regulations as are necessary to administer the limitations contained in paragraph(2)." NAB suggests that, at this initial stage, the Commission adopt rules which restate the retransmission consent requirement and the statutory limitations and establish a simple procedure for dealing with complaints about unauthorized retransmission. Appendix A contains suggested language for rules following these guidelines. If experience demonstrates that more specific rules are needed, the Commission can adopt them in light of specific problems which arise under the Act.

The Commission recognizes (*Notice* ¶ 46 n. 62) that Congress specified that the definitions of several of the exceptions it created to retransmission consent be taken from similar restrictions found in the Satellite Home Viewer Act, 17 U.S.C. §

119, in effect when the Cable Act was passed. Congress appears to have intended to create a communications law-based remedy for retransmissions of the signals of network affiliates to home dishes that would be impermissible under the copyright laws. As an aid to compliance with the Cable Act's requirements, and to avoid confusion if the Copyright Act were amended, NAB suggests that the Copyright Act definitions be incorporated into the Commission's rules.

NAB submits that the Commission utilize its established procedures in § 76.9 of the rules in dealing with complaints about retransmission consent. Under these procedures, television stations whose signals are being retransmitted without consent, or network affiliates in whose service areas a distant affiliate's signal is improperly distributed, would file a petition setting forth the relevant facts and the reasons the petitioner believes a signal is being retransmitted in violation of the Communications Act. After an opportunity for reply, the Commission would then determine whether it should order the entity retransmitting a signal improperly to show cause why it should not be ordered to cease and desist, or whether it should initiate a forfeiture proceeding, or both. The Commission is familiar with these procedures, and they should make possible speedy and inexpensive resolution of complaints about retransmission of broadcast signals without consent.

A related question arises under paragraph 57 of the *Notice* where the Commission proposes that all disputes between broadcast stations and multichannel video programming distributors concerning retransmission consent be resolved in the courts. NAB believes that this proposal goes too far. Section 325(b) establishes a right under

the Communications Act for stations to require retransmission consent before their signal is used by others. The Commission was established to "execute and enforce the provisions of" the Communications Act. 47 U.S.C. § 151. It should not abdicate complete enforcement responsibility for a provision of its organic law. Moreover, the provisions discussed above requiring the Commission to administer the limitations on retransmission consent presume that the Commission will play a role in enforcing section 325(b).

At the same time, it is appropriate to recognize that some disputes which may arise concerning retransmission consent would be better settled in other fora. NAB suggests that the Commission distinguish between complaints that a station's signal is being retransmitted without any consent, and complaints that particular provisions of a retransmission consent agreement are not being followed. The first type of complaint would be decided by the Commission. For the most part, the issues involved in these disputes will not be complex, and the Commission will provide an expeditious forum for their resolution, particularly since it is familiar with the statutory scheme governing use of broadcast signals. On the other hand, complaints about compliance with existing agreements may be better handled by courts or other authorities. These disputes will likely resemble ordinary contract claims and they will pose no special problems for courts. The Commission should, therefore, entertain complaints about carriage of broadcast signals without retransmission consent using the procedures suggested above.